Supreme Court, U.S.
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No. 08-23

In the Supreme Court of the United States

PAUL M. MATHESON,

Petitioner,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Control Board; THE WASHINGTON STATE LIQUOUR CONTROL BOARD; THE STATE OF WASHINGTON; and CHAD R. WRIGHT, Cigarette Compact Department Administrator, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF WASHINGTON SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

Whether the State of Washington Cigarette Tax laws are federally preempted and inapplicable to an American Indian motor carrier hauling cigarettes between Indian reservations in Interstate and Indian Commerce.

Whether the laws of the State of Washington can regulate an enrolled tribal Indian shipping goods between a federally recognized Indian Reservation in Idaho to his business on the reservation of his membership located in the State of Washington.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court. Petitioner is an individual.

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PETITION FOR A WRIT OF CERTIORARI

The case was filed in the State Court of Washington, Thurston County. It was dismissed by the trial court. The case was timely appealed to the Court of Appeals of Washington State. The Opinion, dated July 10, 2007, is reprinted in Appendix A-1 to this Petition. It is officially reported at 161 P.3d 486 (Div II 2007).

The State of Washington Supreme Court denied review on April 2, 2008,180 P.3d 1292 (2008). The denial is reprinted in Appendix A-17 – A-18.

JURISDICTION

The denial of review of the Washington Supreme Court was entered on April 2, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

The State Court has wrongly decided an important federal question that conflicts with this Court's decision in *Rowe v. New Hampshire Motor Transport Association,* 128 S.Ct. 989, 169 L.Ed.2d 933 (2008). The state statutes regulating Indian transportation are repugnant to the U.S. Constitution and Medicine Creek Treaty.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES RULES AND REGULATIONS INVOLVED

United States Constitution Article VI, second paragraph, Art. § 8 cl. 2;Treaty of Medicine Creek, 10 Stat 1132, (Dec. 26, 1854); 49 U.S.C. § 14501 (c)(1); 49 U.S.C. § 13102 (16); Wash.Rev.Code 43.06.455(3), 43.06.455(5)(b), 82.24.250(7)(c); 82.24.290.

STATEMENT OF THE CASE

Petitioner, Paul Matheson, is an enrolled member of the Puyallup Tribe of Indians, a federally recognized Indian Tribe. Matheson seeks Certiorari to review the decision of the Washington State Supreme Court imposing Washington state cigarette tax statutes on his Indian business located on the Puyallup Indian Reservation.

This court has jurisdiction under the principles of federal preemption mandated by the Interstate Commerce Clause of the United States Constitution, art. §8 cl. 2, Indian Commerce Clause, United States Constitution art §8 cl. 2, and Supremacy clause, United States Constitution, art. VI paragraph 2.

The statutes, Wash. Rev. Code 43.06.455(3); 43.06.455(5)(b), and 82.24.250(7)(c) are federally preempted.

The state court dismissed the action. Therefore, the only record is the Complaint. It is attached as Appendix A-19.

Paul Matheson is a fully enrolled Puyallup Indian who operates a retail business on trust land on the reservation that sells tobacco products, including cigarettes. Complaint, Appendix C, page 7. The Puyallup Tribe and Reservation was created by the Treaty of Medicine Creek, 10 Stat 1132 (Dec. 26, 1854). The Treaty allows the Tribe to control the Reservation.

The State of Washington and the Puyallup Tribe entered into a contract on April 20, 2005. Appendix A-51. It forced Matheson to charge a minimum price on his retail sales of cigarettes. The State of Washington was to receive 30% of all taxes the Tribe collected.

The agreement forced Matheson to maintain minimum prices on his sales. Complaint, Appendix A-27.

If the State cigarette tax was increased, Matheson had to increase his retail prices. In addition, Matheson had to buy only from state certified wholesalers in compliance with state laws. Wash. Rev. Code 43.06.455(5)(b) and (c).

Matheson commenced the case in the State of Washington in the state court, including its employees who implemented the contract, the Puyallup Indian Tribe and its tobacco department administrator. The Complaint requested a declaratory judgment against the Puyallup Tribe and the State of Washington seeking an injunction and declaratory judgment against the State's cigarette tax. Matheson requested a declaratory judgment that the agreement was void. He also sought damages for being forced to abide by the contract alleging that the agreement was a monopolistic conspiracy between the contracting parties.

REASONS FOR GRANTING THE WRIT

The judgment of dismissal of the State Court upheld State of Washington statutes allowing regulation and taxation of reservation Indians.

The judgment of dismissal of the State Court also upheld the state of Washington's regulation of transportation in Interstate Commerce.

All of the state statutes violate the United States Constitution's exclusive control of Indian and interstate commerce. The state statutes are preempted by the United States Constitution.

The State of Washington enacted Wash. Rev. Code 43.06.455 (3), stating:

(3) A cigarette tax contract with a tribe shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers. The tribe may allow an exemption for sales to tribal members.

The state also enacted Wash. Rev. Code 82.24.250(7)(a-c) stating:

(a) For purposes of this section, the term person authorized by this chapter to possess unstamped cigarettes" means:

(b) . . . . . .

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

This Court's decision of *United States v. Lara,* 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) held that the plenary power to legislate on Indian matters is reserved to the Congress of the United States. The Constitution of the United States, art. §8, cl. 2, vests Congress with exclusive authority over tribal Indians, especially treaty tribes. *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 455, 115 S.Ct. 2214, 132 L.Ed. 2d 400 (1995).

The Washington Supreme Court did not review this Court's decision in *Rowe v. New Hampshire Transport Association,* 128 S.Ct 989, 169 L.Ed.2d 933 (2008), a case that requires that this Court remand this case. *Rowe* held that carriers of cigarettes going through other states do not have to comply with state laws. This Court held that state laws and regulations requiring different treatment of tobacco carriers are preempted by federal interstate commerce laws. The preemption of Indian Commerce is to preserve national uniformity on Indian issues, an issue that is similar to national union matters. *Chamber of Commerce of the United States v. Brown,* 128 S.Ct. 2408 (2008).

This case applies to all motor vehicles transporting cigarettes. 49 U.S.C. §13102 (16) defines a motor vehicle as any mechanical powered vehicle used on a highway. *Robertson v. Washington State Liquor Control Board,* 10 P.3d 1079, 1088, (Wash. App. Div. 3, 2000), involves Indian cigarette transportation into the state of Washington and held the opposite of *Rowe.* The Washington Court held that the same statute 49 U.S.C. § 14501(c)(1) did not preempt state law as it was "too tenuous, remote or peripheral" *Rowe* held the opposite, 128 S. Ct. at 995.

A New York case on Indian cigarette transportation, *Ward v. New York*, 291 F.Supp.2d 188, 208 (W.D.NY 2003), construed the same statute, 49 U.S.C. § 14501(c)(1), and held the same as *Robertson*.

CONCLUSION

This Court's decision in *Rowe* requires a remand to the Supreme Court of the State of Washington.

DATED: July 1, 2008.

Respectfully Submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PAUL M. MATHESON, No. 35067-0-II
Appellant,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director; GARY O'NEIL, Assistant Director, Washington State Department of Revenue; WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager; WASHINGTON STATE LIQUOR CONTROL BOARD; STATE OF WASHINGTON; CHAD R. WRIGHT, Cigarette Compact Department Administrator, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS,

Respondents.

PUBLISHED OPINION

PENOYAR, J. The Puyallup Tribe (the Tribe) and the Washington Department of Revenue (the State) entered into an Agreement (the Agreement) regulating imposition of taxes on cigarette sales in Indian country.[1] Paul Matheson, a tribal member and

[1] The Agreement defines "Indian Country" to encompass all land within the Puyallup Indian Reservation, including all patent lands, trust lands, and rights of way. Clerk's Papers (CP) at 99; *see* 18 U.S.C. 1151.

cigarette retailer, sued both the State and the Tribe, alleging that the Agreement was illegal on several grounds. The trial court dismissed the Tribe as a defendant due to its sovereign immunity. Then, finding that the Tribe was an indispensable party, it dismissed the complaint altogether. Matheson appeals, arguing that the trial court erred in finding the Tribe indispensable and in dismissing the case. The trial court was correct in recognizing the Tribe's sovereign immunity and in finding that it was an indispensable party. We affirm.

FACTS

On April 20, 2005, the Tribe entered into an Agreement with the State governing the taxation of cigarettes sold by the Tribe and Tribally-licensed retailers in Indian country. The Washington Legislature previously authorized the Governor to enter into such an Agreement, and the Agreement took effect immediately. *See* RCW 43.06.465.

The Tribe agreed to impose and maintain a retail tax on cigarettes that would increase in lockstep with any future increase in the State cigarette tax. In return, the State agreed to waive its right to collect State cigarette sales and use taxes on transactions from "the Tribe, Tribally-licensed retailers, state licensed wholesalers . . . or retail buyers." Clerk's Papers (CP) at 101. Additionally, the Tribe agreed to provide the State 30 percent of the revenue from the new cigarette tax. The Agreement also (1) limits the Tribe and Tribally-licensed retailers' acquisition of cigarettes to wholesalers or manufacturers licensed by the State to sell cigarettes wholesale, and (2) requires that all cigarettes sold by Tribally-licensed retailers and the Tribe bear a Tribal

tax stamp that includes the wholesaler's serial number. The Tribe also agreed to impose the tax on sales to tribal members.

The State and the Tribe divided enforcement responsibilities under the Agreement — the State agreed to enforce against non-Tribal and non-member wholesalers, and the Tribe agreed to enforce against member retailers.

On May 10, 2005, Matheson filed a complaint in Thurston County Superior Court against both State[2] and Tribal[3] defendants for injunctive relief, declaratory judgment, and damages. In his complaint, he requested in part that the court (1) find RCW 43.06.450-460 (granting the Governor the authority to enter the Agreement) unlawful and unenforceable; (2) hold any resulting agreement unenforceable; (3) enjoin the State and Tribal defendants from either reaching an agreement or enforcing it; and (4) grant him monetary damages, costs, and attorney fees. He later filed an amended complaint, but neglected to either file a motion to amend or obtain the State's consent to amend. Therefore, the trial court granted the State's motion to strike the complaint.[4]

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[2] State defendants included Governor Gregoire, the Director and Assistant Director of the Washington State Department of Revenue, the Washington State Department of Revenue, the Tobacco Tax Control Enforcement Program Manager, the Washington State Liquor Control Board, and the State of Washington (herein referred to as "the State").

[3] Tribal defendants included Cigarette Compact Department Administrator Chad Wright and the Puyallup Tribe (herein referred to as "the Tribe").

[4] Matheson also filed a motion for injunctive relief on August 31, 2005, to prevent implementation of the Agreement. The trial court denied the motion and Matheson filed a motion for

The Tribe filed a motion to dismiss, which the State defendants joined, arguing that it and its officials were protected from suit due to sovereign immunity. The State later filed another motion to dismiss, arguing that the Tribe was an indispensable party under CR 19. On May 26, 2006, the trial court dismissed the Tribe on the basis of sovereign immunity, found that it was an indispensable party, and therefore dismissed the State. Matheson filed a motion for reconsideration, which was denied on June 9, 2006.

However, two days before the court's decision on his motion for reconsideration, Matheson filed a motion to serve a second supplemental complaint, noting it for hearing on July 7, 2006. In this new complaint, Matheson added a new plaintiff and two new State defendants, removed all Tribal defendants, and asked for a refund of cigarette taxes paid.

On July 6, 2006, one day before the scheduled motion hearing, Matheson filed a notice of appeal of the trial court's order denying his motion for reconsideration. The next day, the parties stipulated that the trial court would not consider Matheson's second supplemental complaint due to this appeal.

ANALYSIS

I. DISMISSAL OF TRIBAL DEFENDANTS-TRIBAL SOVEREIGN IMMUNITY

A. Sovereignty Issues Raised by Matheson

Matheson generally assigns error to the trial

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reconsideration on January 3, 2006. The trial court denied the motion for reconsideration nine days later, concluding that Matheson failed to show either manifest error or new facts or legal authority.

court's dismissal of his complaint, but he fails to specifically assign error to the trial court's dismissal on the basis of sovereign immunity. Indeed, he does not specifically address the Tribe's sovereign immunity in his opening brief but instead makes claims regarding only "antitrust immunity" and "tribal sovereignty." Appellant's Br. at 16, 18. While Matheson does address tribal sovereign immunity in his reply briefs, none of these arguments are persuasive.

For example, Matheson contends that the Tribe's sovereign immunity "has been waived by ceding control to the State to regulate on-reservation tribal retailers." 1 Appellant's Reply Br. at 6.[5] However, to support this claim, he does not rely on a case regarding tribal sovereign immunity, but on a case addressing a tribe's assertion of jurisdiction over non-members. *See Cordova v. Holwegner,* 93 Wn. App. 955, 966, 971 P.2d 531 (1999). Matheson then states that "jurisdiction determines immunity in this case," but he offers no legal authority or precedent to support that statement. 1 Appellant's Reply Br. at 7.

Matheson later states that "[t]he contemporary rule is that the Puyallup Tribe has no immunity when it has no jurisdiction to tax since Indians no longer have a right to govern persons other than themselves." 1 Appellant's Reply Br. at 9. He then cites *Montana v. United States,* 450 U.S. 544, 565, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), for the proposition that "inherent sovereign powers of an

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[5] Matheson submitted two reply briefs, separately addressing the State's and the Tribe's responses. "1 Appellant's Reply Br." refers to his reply to the State; "2 Appellant's Reply Br." refers to his reply to the Tribe.

Indian tribe do not extend to the activities of non-members of the tribe." 1 Appellant's Reply Br. at 9. This statement neither supports Matheson's "contemporary rule" nor has any application or bearing on the issue of the Tribe's sovereign immunity.

Additionally, Matheson argues that the Tribe's agreement to raise its tax automatically, in lockstep with the State, constitutes "off-reservation conduct and joint control." 2 Appellant's Reply Br. at 2. Matheson appears to contend that the Tribe is subject to State law when it goes off-reservation, but this is unclear. He states that "[w]here joint control is shared by agreement, a tribe has no immunity," but again does not offer legal authority to support that statement. 2 Appellant's Reply Br. at 2.

Matheson relies on a recent U.S. Supreme Court case, *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005), for the proposition that "taxing non-Indian wholesalers who sold to on-reservation Indians did not violate tribal sovereignty." Appellant's Br. at 18. Matheson confuses a violation of tribal sovereignty with a waiver of tribal sovereign immunity. In *Wagnon,* the tribe was the plaintiff — the opinion does not discuss the issue of tribal sovereign immunity. Furthermore, *Wagnon* did not address a tax mutually agreed to by a tribe and the state, but a state tax imposed on gasoline distributors (not retailers), both on and off the reservation. *Wagnon,* 546 U.S. at 99-100.

Matheson also argues that the Tribe had no immunity from suit "as it had no congressional permission to enter into the contract." 2 Appellant's Reply Br. at 7. He contends that the Tribe should

have remained a party to the declaratory judgment claim because it was a participant in price fixing. These arguments fail to grasp the fundamental nature of sovereign immunity, which does not prevent sovereigns from entering into contracts but, instead, protects them from lawsuits. Sovereign immunity protects a tribe from suit absent an unequivocal waiver. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

Finally, Matheson claims that "the Puyallup Tribe went off the reservation to require Matheson to buy his inventory exclusively from wholesalers licensed by the [S]tate," and therefore the Tribe is subject to state court jurisdiction. 2 Appellant's Reply Br. at 2. However, neither the record nor the cases Matheson relies on support this proposition. Tribal sovereign immunity protects tribes from suits arising from both governmental and commercial activities, whether conducted on or off a reservation. *Wright v. Colville Tribal Enter. Corp.,* 159 Wn.2d 108, 112, 147 P.3d 1275 (2006) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 754-55, 760, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)).

B. Application of Sovereignty Principles

Personal jurisdiction over a party asserting tribal sovereign immunity is a question of law we review de novo. *See Anderson & Middleton Lumber Co. v. Quinault Indian Nation,* 130 Wn.2d 862, 876, 929 P.2d 379 (1996).

Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and "unequivocal" waiver or abrogation. *See Wright,* 159 Wn.2d at 112 (citing *Santa Clara Pueblo,* 436 U.S. at

59). As "domestic dependent nations," Indian tribes "exercise inherent sovereign authority over members and territories," including sovereign immunity from suit, "absent a clear waiver by the tribe or congressional abrogation." *Wright,* 159 Wn.2d at 112 (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)). As noted above, tribal sovereign immunity protects tribes from suits involving both "governmental and commercial activities," whether conducted "on or off a reservation." *Wright,* 159 Wn.2d at 112 (citing *Kiowa Tribe,* 523 U.S. at 754-55, 760).

We recognize that the Fifth Circuit has held that *Kiowa* preserves tribal sovereign immunity from damage awards only; under that rule, tribal immunity does not protect tribes from declaratory and injunctive relief *See Comstock Oil & Gas v. Alabama & Coushatta Indian Tribes of Tex.,* 261 F.3d 567, 571-72 (5th Cir. 2001); *TTEA v. Ysleta Del Sur Pueblo, 181 F.3d* 676, 680-81 (5th Cir. 1999). However, neither the Ninth Circuit nor Washington State has adopted a similar rule — Wright preserved tribal sovereign immunity in the face of a suit for damages but did not address any equitable claims. *See Wright,* 159 Wn.2d at 111-12.

Because Matheson requested both equitable relief and damages, sovereign immunity protects the Tribe from his suit, even under the narrow Fifth Circuit rule. Furthermore, the Tribe did not waive its sovereign immunity; the Agreement specifically states that nothing in it shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

The Ninth Circuit carved out an exception to

absolute sovereign immunity in *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Coop. Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). In cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute. *Burlington N R.R.*, 924 F.2d at 901; *see also Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002). However, tribal sovereign immunity continues to protect individual tribal officials acting in their representative capacity and within the scope of their authority. *See Wright*, 159 Wn.2d at 116; *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985).

Here, Matheson named Chad Wright individually in his official capacity as the Tribe's Cigarette Tax Director. Still, no exception applies because Matheson seeks damages and equitable relief, not merely prospective relief. Therefore, both the Tribe and Wright are protected by sovereign immunity; the trial court did not err in dismissing them, and we affirm.

II. DISMISSAL OF STATE DEFENDANTS — NECESSARY/INDISPENSABLE PARTY

Matheson argues that the trial court erred by dismissing the State defendants after it determined that the Tribe was an indispensable party. Specifically, he argues that (1) the trial court erred in holding that the Tribe was an indispensable party, and (2) the State defendants should not have been

dismissed.[6]

Our Supreme Court recently held that the appropriate standard of review for a trial court's dismissal under CR 12(b)(7) for failure to join an indispensable party under CR 19 is abuse of discretion. *Gildon v. Simon Prop. Group,* 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). Any legal conclusions underlying the decision are reviewed de novo. *Gildon,* 158 Wn.2d at 493.

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Gildon,* 158 Wn.2d at 494. An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Gildon,* 158 Wn.2d at 494. Dismissal under CR 12(b)(7) is a drastic remedy, and trials on the merits are preferred, so dismissal is employed sparingly when there is no other ability to obtain relief. *Gildon,* 158 Wn.2d at 494.

Under CR 19, a trial court undertakes a two-part analysis. First, the court must determine whether a party is needed for just adjudication. *See Gildon,* 158 Wn.2d at 494 *(citing Crosby v. Spokane County,* 137 Wn.2d 296, 306, 971 P.2d 32 (1999); CR 19(a)). Second, if an absent party is needed but it is

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[6] Matheson also repeatedly mentions the trial court's lack of consideration of his second supplemental complaint as additional error. This issue is addressed in further detail below, but the trial court did not commit error — because the trial court did not issue a final judgment on Matheson's motion to-serve his second supplemental complaint, the arguments contained therein are not preserved for review.

not possible to join the party, then the court must determine whether in "equity and good conscience," the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. *See Gildon,* 158 Wn.2d at 495 *(citing Crosby,* 137 Wn.2d at 306-07; CR 19(b)).

The CR 19 factors to be considered include: (1) the extent a judgment rendered in the party's absence might be prejudicial to him or those already parties; (2) if there is prejudice, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the party's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. CR 19(b); *e.g. Crosby,* 137 Wn.2d at 306-07. In analyzing whether a party is a necessary and indispensable party, CR 19 "calls for determinations that are heavily influenced by the facts and circumstances of individual cases." *Gildon,* 158 Wn.2d at 495.[7] The burden of proof for establishing indispensability is on the party urging dismissal. *Gildon,* 158 Wn.2d at 495.

The first step here is satisfied – the Tribe is necessary for just adjudication. It is a fundamental principle that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Wilbur v. Locke,* 423 F.3d 1101, 1113 (9th Cir. 2005) (quoting *Dawavendewa,* 276 F.3d at 1157).

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[7] Matheson cites to a number of cases that purportedly hold that a tribe is not an indispensable party. However, the required analysis is extremely fact-intensive, and none of the cases he cites are truly analogous.

Because the Tribe is necessary, but it is not possible to join it, we review the trial court's determination, keeping in mind the four CR 19 factors. Here, the first three factors weigh in the Tribe's favor, but the final factor favors Matheson.

First, a judgment rendered in the Tribe's absence would greatly prejudice the Tribe. If a court were to grant Matheson the relief he requests, the Agreement would essentially disintegrate. The Tribe has a substantial interest in the continued existence of the Agreement; any change to the Agreement would inherently prejudice the Tribe.

Furthermore, it is not apparent how the remedy could be shaped to lessen the prejudice to the Tribe. Proceeding on the antitrust claims alone, as Matheson seems to suggest, would still jeopardize the Agreement if Matheson were to succeed. If the trial court allows him to serve a second supplemental complaint (this issue is examined below), Matheson may suggest a remedy that will not prejudice the Tribe, but evidence of such a remedy is not before us.

Third, it is difficult to imagine how a remedy fashioned without the presence of the Tribe would be adequate to address Matheson's concerns. Each of Matheson's arguments center around the Agreement's dissolution, and any lesser remedy (as would be required in the absence of the Tribe) will not likely be adequate to address his concerns.

The final factor however, weighs heavily in Matheson's favor. Matheson may not have an adequate remedy if his case is dismissed, though it is possible that he could pursue action in tribal court. Despite this, the Ninth Circuit has regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs.

Wilbur, 423 F.3d at 1115. Therefore, balancing all four factors illustrates that the Tribe was indeed an indispensable party, and the trial court did not err in dismissing the suit.

Matheson also claims that the trial court erred "by refusing to follow" *Aungst v. Roberts Constr. Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167 (1981), which held that a tribe was "not an indispensable party and therefore not a necessary party." Appellant's Br. at 1. There are two problems with this argument. First, *Aungst* is distinguishable. The court there held that a tribe was not an indispensable party in a suit against a non-tribal corporation for violations of the Consumer Protection Act and the Securities Act of Washington because it was possible to craft a remedy that did not prejudice the tribe. *Aungst,* 95 Wn.2d at 444. Furthermore, Matheson is mistaken about the law: a necessary party may be indispensable, but a dispensable party may still be necessary. *See* CR 19.

III. SECOND SUPPLEMENTAL COMPLAINT

Matheson claims that the trial court also erred by not allowing him to file his second supplemental complaint. The State responds that Matheson's notice of appeal precluded the trial court from ruling on his motion to serve the second complaint.

The parties stipulated that the trial court would *not* consider Matheson's motion to file the second complaint pending his appeal on the trial court's denial of his motion for reconsideration. Matheson's argument here mischaracterizes the record. Because the trial court did not rule on his motion to file a second complaint, this issue is not ripe for review. *See* RAP 2.2, 9.2.

IV. VALIDITY OF CIGARETTE TAX

AGREEMENT STATUTORY REQUIREMENTS

Matheson argues that the "Dormant Indian Interstate Commerce Clause" and "[o]ther [c]onstitutional [p]rovisions" invalidate RCW 43.06.455(5)(b), .455(8), and the provisions of the Agreement "[a]llowing State [e]mployees [o]r [a]gents to [r]egulate Plaintiff"[8] Appellant's Br. at 20. He claims that "[t]he dormant commerce clause is a limitation of State authority over Indian reservations and reservation Indians" and that "[t]he dormant Indian commerce clause is a limitation of State authority over Indian reservations and reservation Indians," but again, he offers no support or legal authority to support these arguments. Appellant's Br. at 21, 22.

Furthermore, the merits of Matheson's argument regarding the legality of the Agreement are not before us. Matheson assigned error to the trial court's "[upholding] the validity" of the Agreement, but the trial court did not do so. Appellant's Br. at 3.

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[8] RCW 43.06.455(5) and RCW 45.06.455(8) state:

> (5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:
>
> ...
>
> (b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the state of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative and enforcement powers over such wholesalers or manufacturers to the extent permitted by law.
>
> ...
>
> (8) Tax revenue retained by a tribe must be used for essential government services. Use of tax revenue for subsidization of cigarette and food retailers is prohibited.

The court dismissed Matheson's complaint without reaching its merits.

Matheson appears to raise a case of first impression on the legality of Tribal-State compacts not expressly approved by the federal government. However, he has failed to adequately argue his constitutional claims, and he failed to preserve the substantive issues for appeal. The legality of such compacts poses an interesting legal question, but investigation into the issue is not well served by the posture of this case. We therefore decline review of Matheson's substantive arguments.

V. MOTION FOR RECONSIDERATION

Matheson's notice of appeal specifically sought review of the trial court's decision denying his motion for reconsideration. However, he fails to either assign error or put forth any argument regarding the trial court's denial of his motion. Therefore, we need not consider whether the trial court's denial of Matheson's motion for reconsideration was proper. *See* RAP 10.3(a)(3).

VI. FAILURE TO STATE A CLAIM

Matheson repeatedly asserts the merits of his case regarding possible violations of the Medicine Creek Treaty, the Privileges and Immunities Clause, and federal antitrust law. The merits of his case were not decided by the trial court and are not properly before us. As we stated above, we review a CR 19 dismissal for abuse of discretion, not de novo.

Finally, Matheson argues that the order dismissing the case was "cursory and incomplete" because it did not address all material issues. Appellant's Br. at 10. He fails to specify what the

trial court omitted from its order and cites only one out-of-state case to support his claim.[9] Washington has not adopted a similar rule; this argument is not persuasive.[10]

ATTORNEY FEES

The Tribe argues that it is entitled to attorney fees under RAP 18.9(a), which authorizes an attorney fees award when responding to a frivolous appeal. An appeal is frivolous when there are no debatable issues on which reasonable minds would differ, when the appeal is so devoid of merit that there was no reasonable possibility of reversal, or when the appellant fails to address the basis of the trial court's decision. *See Mahoney v. Shinpoch,* 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987).

This appeal was not frivolous; Matheson did raise debatable issues on which reasonable minds would differ. We therefore decline to grant the Tribe's request.

We affirm.

s/_____
Penoyar, J.

We concur:

s/_____
Houghton, C.J.

s/_____
Van Deren, J.

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[9] *Fireman's Ret. Sys. Of St. Louis v. City of St. Louis,* 911 S.W.2d 679, 681 (Mo. Ct. App. 1995) (reversing an "incomplete" trial court order because it did not address all legal issues raised).

[10] We note that we soundly rejected this exact argument in *Bercier v. Kiga,* 127 Wn. App. 809, 825, 103 P.3d 232 (2004).

THE SUPREME COURT OF WASHINGTON

PAUL M. MATHESON, Petitioner, v. CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director; GARY O'NEIL, Assistant Director, Washington State Department of Revenue; WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager; WASHINGTON STATE LIQUOR CONTROL BOARD; STATE OF WASHINGTON; CHAD R. WRIGHT, Cigarette Compact Department Administrator, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, Respondents.	)	NO. 80515-6 **ORDER** C/A NO. 35067-0-II

Department II of the Court, composed of Chief Justice Alexander and Justices Chambers, Madsen, Fairhurst and Stephens (Justice C. Johnson sat for Justice Chambers), at its April 1, 2008, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of April, 2008.

For the Court

s/_____
Gerry L. Alexander
Chief Justice

SUPERIOR COURT, STATE OF WASHINGTON, FOR THURSTON COUNTY

PAUL M. MATHESON Plaintiff, v. CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Board; and THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; and CHAD R. WRIGHT, Cigarette Compact Department Administrator; Puyallup Tribe of Indians; and the PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe; Defendants.	No. 05-2-00892-7 COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT AND DAMAGES FOR CIVIL, CONSTITUTIONAL AND RICO VIOLATIONS

Plaintiff, through his attorney, hereby submits

this Complaint for Injunctive Relief, Declaratory Judgment, Civil Rights and RICO Damages, and alleges as follows:

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

1. This suit is by an enrolled member of the Puyallup Tribe of Indians and an Indian business organization doing business on Indian land held in trust by the Bureau of Indian Affairs of the Department of the Interior on the Puyallup Indian Reservation. The suit seeks prospective injunctive and declaratory relief against the Defendants to prevent them from forcing Plaintiff to collect and pay over tribal cigarette taxes. The Department of Revenue, through its Director and Assistant Director, the Tobacco Tax Enforcement Manager of the Washington State Liquor Control Board and the Tobacco Tax Administrator for the Puyallup Tribe of Indians, and the Puyallup Tribe of Indians are also Defendants as allowed by *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

Constitutional Background

2. The Puyallup Indian Reservation was recognized and approved by the United States on December 26, 1854, by the Treaty of Medicine Creek, 10 Stat 1132. Plaintiff is an enrolled member of the Puyallup Tribe of Indians and does business on the Puyallup Indian Reservation. Plaintiffs business is located on the Puyallup Indian Reservation. The reservation is located within the Western Washington region of Washington State. The

Puyallup Tribe has been accorded privileges as a state pursuant to 26 U.S.C. § 7871(a) for certain tax purposes. The Defendants combined in a conspiracy to protect the State of Washington cigarette tax law and regulations by entering into a contract to illegally deprive Plaintiff of income from his business.

Sovereign Immunity

Neither the State of Washington or the Puyallup Tribe of Indians are entitled to sovereign immunity. The Puyallup Tribe of Indians violates any right it may have to sovereign immunity as it is collecting and remitting tax to the State of Washington, actions that are beyond its jurisdiction. The Puyallup Tribe also waived any sovereignty by not regulating the immigration of white persons into its territory. The Puyallup Tribe entered into a contract without peimission of Congress or the Bureau of Indian Affairs. The Puyallup Tribe is competing in private business with Plaintiff. It is attempting to assert sovereign immunity that was waived and may no longer be existing to Indian Tribes.

The State of Washington loses any sovereign immunity as it is attempting to collect its taxes in interstate or Indian commerce beyond its jurisdiction. It is acting in concert with a domestic dependent nation beyond its jurisdiction. It is unable to collect State taxes under the common law revenue rule or the United States constitutional restrictions on the free flow of commerce. It is conspiring with others to indirectly collect state taxes, a practice that it cannot achieve by direct taxation. It is also using its departmental employees to administer taxes of

another state or nation in areas beyond its jurisdiction. It also is in violation of the intent of Congress to treat all Indians uniformly so that they can govern themselves. These constitutional violations waive sovereignty of the State and its employees.

Jurisdiction

3. This Court has jurisdiction of the claims for relief as outlined in the following paragraphs:

4. The Complaint seeks to invalidate all or parts of the contract laws and regulations of the State of Washington allowing tax agreements with Indian tribes are violative of the Interstate Commerce Clause, the Indian Commerce Clause, and the Import Clause of Article I, section 8, clause 2, of the United States Constitution. The actions of Defendants also violate Article 1 §10 prohibiting a State from entering into treaties. The Supremacy Clause, Article VI, cl. 2, is also applicable, stating in part: "This Constitution, ... laws . . . and all treaties made,. . . under the authority of conspiracy of the Defendants also violates Articles XXVI Second; Article VII §1; Article I §12; Article II §1 and Article III §5 of the Constitution of the State of Washington.

5. The proposed action and the cigarette contract law and regulations violate equal protection guaranteed by the Fourteenth Amendment of the United States Constitution.

6. The conduct of Defendants violates federal common law; federal statutes; including the Indian Trader Act, 25 U.S.C. §§ 261 and 262, the federal constitutionality of state law; federal regulations; and the inherent sovereign powers and immunity of the Puyallup Tribe to be free of any requirement to make

agreements with adjoining states on the subject of state or tribal taxes.

7. As an action for an injunction, damages and attorney's fees against Defendants for violations of the civil, constitutional and treaty rights of Plaintiff as protected under RCW 49.30.030, 42 U.S.C. § 1983, Public Law 102-166, and the Civil Rights Law of 1991 as enacted on November 21, 1991.

8. As an action for injunction terminating or preventing a conspiracy by Defendants and the Puyallup Tribe to monopolize and set the retail price of cigarettes in the federally exempt areas within the boundaries of the State of Washington. The conspiracy violates 19.86.030, 050, 15 U.S.C. §§ 1, 2, and 15 of the Sherman Act as an illegal monopoly.

9. Pursuant to RCW ch. 7.40 as an action seeking a declaratory judgment to invalidate state laws attempting to control enrolled Indians living on Indian reservations.

Exhaustion of Remedies

10. Any request to the State of Washington to bring this action would be meaningless, unavailing, result in undue expense and a waste of time as the actions of the State in conspiracy with the Puyallup Indian Tribe are the actions that are part of the Plaintiff's claim for relief.

Venue

11. The Puyallup Indian Tribe and Reservation is a domestic dependent nation. A substantial part of the events and meetings sought to be invalidated took place in Thurston County. Most of the Defendants reside on or have offices in Thurston County. Plaintiff seeks an injunction which, if issued,

will apply to employees of the State of Washington, Olympia, Washington. The central offices of the Defendant Department of Revenue are also located in Washington and the Washington State Liquor Control Board in Thurston County. Venue, subject to change for convenience of witnesses, is proper pursuant to RCW 4.12.020 (2), 4.12.025.

PARTIES

Plaintiff

12. Plaintiff Paul Matheson is an enrolled member of the Puyallup Tribe of Indians and is engaged in business in the operation of a retail storeon trust land within the Puyallup Indian Reservation. He is a fully enrolled member of the Puyallup Indian Tribe. Plaintiff's immunity from cigarette taxes is derived directly from the Treaty of Medicine Creek and not through the Puyallup Tribe of Indians. His tax immunity is a retained right andprivilege. His right to Indian commerce is preempted by the U.S. Constitution.

13. Plaintiff is engaged in the operation of a retail store on land held in trust by the Bureau of Indian. Affairs. The store is located at Fife, Washington. The State of Washington has seized Plaintiffs property illegally, has stalked Plaintiff, and has listed him in tax studies of state revenue loss for at least the last 15 years. The store sells packaged tobaccoproducts, including cigarettes, and other goods at retail. It is fully licensed by the Puyallup Tribe to sell cigarettes, tobacco and other retail items.

Defendants

14. Defendant Christine Gregoire is the Governor of the State of Washington and the person

who was illegally authorized to execute a contract concerning tribal cigarette taxes with the Puyallup Tribe.

15. Defendant Cindi Yates is the Director of the Washington State Department of Revenue.

16. Defendant Gary O'Neil is the Assistant Director of the Special Programs Division and is in charge of tax enforcement for Washington State's Department of Revenue.

17. Defendant Washington State Department of Revenue is a department of the State of Washington established by Wash.Rev.Code 82.01.050. The Department of Revenue employs Defendants Cindi Yates and Gary O'Neil.

18. Defendant State of Washington is a state of the United States that agreed to the terms of the Enabling Act (25 U.S. Statutes at Large c 180 p 676) on February 22, 1889 in order to achieve statehood. The terms of the Act include a provision agreeing that absolute jurisdiction and exclusive control of tribal Indians is retained by the Congress of the United States.

19. Defendant M. Carter Mitchell is the tobacco enforcement program manager of the Washington State Liquor Control Board.

20. Defendant Washington State Liquor Control Board, is a department of the State of Washington and engages in enforcement of the Puyallup Tribe cigarette tax.

21. Defendant Chad Wright is the cigarette compact department administrator and in charge of tobacco and cigarette management for the Puyallup Tribe of Indians.

22. The Puyallup Tribe of Indians is a federally recognized tribe with offices at Tacoma, Washington.

23. All personal defendants are named in their official capacities and not personally.

24. The Plaintiff has operated a retail sundries and gift shop at both the Coeur d'Alene Indian reservation and is currently operating on the Puyallup Indian reservation. All persons who have an interest in Plaintiffs business are family members who are fully enrolled members of the Puyallup Tribe, or qualify as Puyallup tribal members or the Coeur d'Alene Tribe, or are spouses.

25. Plaintiff has inquired and have been informed by the respective persons in charge of the negotiations for the State of Washington and the Puyallup Tribe have entered into, contract, intended to be within the enactments of RCW 43.06.450 through 460, that apparently was executed by former Governor Gary Locke on April 20, 2005 or may be signed by Governor Gregoire with the Puyallup Tribe. The contract will force the Puyallup Tribe to charge all customers of Indian retailers located on trust lands in the Puyallup reservation to pass on and collect a Puyallup tribe cigarette tax of approximately 87% of the amount the cigarette tax charged by the State of Washington on retail purchasers of cigarettes who are subject to the State's taxing jurisdiction. Plaintiff has never been informed or asked to be a party to the negotiations. He has been totally denied any participation or information. To the knowledge of Plaintiff, no public hearings were held prior to the execution of the contract. To Plaintiff's knowledge, none of the enrolled members who sell cigarettes on the reservation are parties to the contract. Defendants have enacted and intend to utilize the provision of RCW 43.06.455(5)(b) and (c) requiring Plaintiff's out-of-state wholesalers to comply with

stamping and taxing laws even though engaged in interstate commerce with no business situs in Washington or the Puyallup Indian reservation. The express purpose of the law is to "enhance enforcement of the State's cigarette tax law." RCW 43.06.450. These statutes require out-of-state manufacturers or wholesalers to be licensed by the Defendants or who agree and are certified by Defendants to comply with the proposed tax contract. The proposed tax contract requires tax stamps and tax collection by the Puyallup tribe. The State is prohibited by its constitution from contracting away its powers of taxation, art VII § 1. Defendant State of Washington also enacted RCW 82.24.290 totally exempting military base retail sales from its cigarette tax. The market for cigarettes is within the area composed of Thurston, Pierce, King, and Snohomish counties within Western Washington. Defendants are attempting to cause an economic blockade for state taxation purposes; to cause customers, wholesalers and manufacturers not to deal with Plaintiff and to boycott Plaintiff's business. Defendants are attempting to control the market and exert complete market power in the region. These actions and proposed actions violate the State Minority Act RCW 19.86.030, 050 and other statutes, including the federal Shuman Act, 15 U.S.C. § § 1-26, and are illegal.

26. Defendants have entered into a conspiracy and sought to monopolize cigarette retail prices by regulating Indian businesses and Indian tribes to impose the same or similar amounts of cigarette tax. RCW 43.06.460. The Puyallup contract is an illegal special legislative contract allowing the Puyallup tribal retailers to charge approximately 87% of the

State cigarette tax creating a price fixing scheme allowing less tax than other contracting tribes. The Defendants are seeking to control all wholesalers and manufacturers who do not do business in Washington to be certified by the State to stamp, collect tax and be totally regulated by the State. The State of Washington and the Puyallup tribe of Indians each sell cigarettes at retail. The attempted conduct is an illegal monopoly by the State and tribe as competitors with Plaintiff to control sales of Plaintiffs products. Damages to Plaintiff will be well in excess of one million dollars. The Defendant State of Washington wrote cigarette manufacturers, threatening to commence and aiding and abetting prosecution against them if the manufacturers allowed Indian smoke shops to obtain financial rebates in the same manner as other retailers. The Defendants are also preferring military affiliated persons and non Indian convenience and discount stores over Indians to gain financial advantages to the State.

27. The State of Washington and the Puyallup Tribe cannot enter into a contract that interferes with Plaintiffs business for at least the following reasons:

A. Only the federal government can make treaties with Indian tribes. The proposed contract is a treaty. Congress has notexpressly authorized either the State or the Tribe to enter into the contract.

B. The proposed contract violates the Treaty of Medicine Creek.

C. The State cannot exert jurisdiction on tax matters directly over tribal Indians. Therefore, it cannot exert indirect tax control of tribal Indians.

D. Only Congress can allow the State to contract with Indian tribes. Congress has not enacted any law allowing state interference with tribal taxation. The action of the State is preempted by federal law and retained rights of Plaintiff.

E. The delegation of power to Defendant Governor Christine Gregoire or former Governor Gary Locke is unconstitutional.

F. The attempt to force reciprocal protective taxes violates the state and federal constitutions and is an unlawful conspiracy. The revenue sharing by the Tribe with the state violates the commerce clause.

G. The attempt by the State and Puyallup Tribe to contract violate the State Civil Rights Act, RCW 49.60.030 and 77.110.040; the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 and 42 U.S.C. §§ 1981-1983.

H. The proposed contract violates the Sherman Anti-Trust Act (15 U.S.C. § 1 and § 14).

I. Only Congress, not the State, can enact or make agreements with Indian tribes and states regarding interstate or Indian commerce. Washington's Constitution Article XXVI, Second states "Said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." RCW 37.12.010 codified public law 280 and states that "But such assumption of jurisdiction shall not apply to Indians when on their tribal lands." RCW 37.12.060 states

"nothing in this chapter shall, authorize . . taxation of personal property . . . belonging to any Indian . . . or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty."

J. The attempt to impose a reciprocal tax on Indian businesses while allowing military base concessionaires within the Puyallup Indian reservation and market area in the State, but outside the reservation to be exempt, violates the equal protection and civil rights of Plaintiff.

K. The State cannot contract away its powers of taxation. Wash. Const. art VII § 1.

L. Allowing the Department of Revenue and Washington State Liquor Control Board to enforce and regulate the tribal tax violates the Indian commerce clause of the Federal Constitution, the common law revenue rule and the interstate commerce clause.

28. The unlawful conspiracy also interferes with Plaintiff's Indian commerce and interstate commerce. Plaintiff is an affected person as he will have to apply additional sums to his sale prices which will reduce or eliminate profit.

29. For purposes of controlling pricing and regulating sales by the State of Washington, there is no significant difference between the tax free treatment of federal military bases and federally recognized Indian reservations. Both are exempted in the State Enabling Act, the State Constitution, the Hayden-Cartwright Act (26 U.S.C. § 104) and the

Buck Act (26 U.S.C. §§ 105-110). The discrimination created by the cigarette contract and laws, the 1995 Cigarette Tax Act, by adding RCW 82.24.190 exempting military sales are unconstitutional enactments creating discriminatory exemptions among two classes that have always been exempted together for cigarette tax purposes. These laws violate article 1, §§ 2, 12 and 26 Second of the Washington State Constitution. They also violate the Fifth and Fourteenth Amendments of the United States Constitution. The discrimination against Plaintiff as an enrolled Indian also violates federal preemption.

30. Defendant State of Washington and its agencies and employees contracts and attempts to contract to impose tribal taxes. The adoption of WAC 458-20-192 and seizures by the State of Plaintiff's of Indian goods discriminates against Plaintiff and other Indians. Defendant State of Washington's laws and regulations impermissibly restrain trade within the area of the State of Washington by allowing tax discrimination in favor of military bases and non Indian convenience and discount stores and against Indians and also restricts out-of-state businesses that trade with Plaintiff.

31. Defendant State of Washington also sells cigarettes or allows concessionaires to sell cigarettes at state parks increasing the State's revenue percentage on state percentage leases. On information and belief, Plaintiff alleges that the Defendant Tribe and State have conspired with wholesale grocery and other national organizations to engage in price discrimination against Plaintiff. The imposition of the tribal tax will also favor non Indian

convenience stores and major discount non Indian retailers in the market area.

32. The injury to Plaintiff is that his purchase costs are increased and profit decreased. He will be placed in a competitive disadvantage by Defendants and deprived of profit from potential customers. Plaintiffs American Indian ancestors traded tobacco and pipes with the Hudson's Bay Company in Washington before the State was admitted to the union. Plaintiffs retained powers predate the State of Washington and cannot be limited by the state enactments by Congress of the U.S. Supreme Court. Plaintiff also request injunctive relief against continued interference by the State with his aboriginal trading rights.

33. Plaintiffs marketing skills and unique aboriginal status add value to the products on the reservation. Plaintiff has a large investment in his business and markets his products by ability to capitalize on his Indian ancestry. The newly enacted law places a substantial and significant burden on Plaintiff in all phases of the purchase, sale, consumption, transportation and distribution of cigarettes and other products.

34. The above-stated combination and conspiracy to monopolize, and other restraints of trade have the following effects, among others:

(a) Competition in the retail tobacco industry on Indian reservations is unlawfully restrained, suppressed, and eliminated.

(b) Plaintiff has suffered discriminatory treatment because of alleged agreements and practices between the State and wholesalers, manufacturers and trade organizations.

(c) The attempted interference with Plaintiff's wholesalers and manufacturers will prevent purchases in interstate commerce.

(d) Plaintiff has been deprived and will be deprived in the future of sales and profits from potential customers.

(e) The State has specifically targeted Plaintiff and selectively prosecuted and attempted to put him out of business for a least the last 15 years.

(f) Defendants have placed Plaintiff in an unfair bargaining position with future employees.

35. As a direct and proximate result of the existing and prospective violations set forth herein, Plaintiff's business opportunities have been substantially reduced, his relative cost greatly increased and profits seriously impaired, all add to their damage in an amount presently unknown. In addition, if Plaintiff must comply in the future with the proposed contract to suffer irreparable damages as a proximate result of Defendants unlawful activities.

36. Plaintiff has never been invited by the Defendants to be a party to the proposed contract. Plaintiff has not been officially contacted or informed of any of the proposed terms or how the Plaintiff's business will be expected to conform or comply with the proposed contract terms. Plaintiff has been denied the rights of free speech, notice and opportunity to be heard.

37. Plaintiff alleges further that even if authority to contract exits, the dormant Commerce Clause or the Indian Commerce Clause prevents such a parity or reciprocal agreement. Plaintiff will be placed at a competitive disadvantage with the

exemptions of military commissaries who compete with Plaintiff and also licensed state retailers. Among other reasons, is the fact that the Puyallup Tribe cannot offer the same services and governmental protections to Plaintiff for the same amount of tax as Defendant State of Washington provides to its licensed retailers. Plaintiff's location is remote and also not competitive to military base or state retailers without sale price advantages. If Plaintiff is required to collect large amounts of cigarette taxes for the Tribe or the State, his business will not be competitive. The tribal cigarette tax is imposed upon consumers who have no consensual relationship with the buyer of cigarettes. The buyer's conduct does not threaten or have any direct effect on the political integrity, economic security, or health and welfare of the Tribe or its members. Therefore, the tax is illegal and invalid. The proposed action of the Defendants, without the temporary injunction, will irreparably and materially interfere with the business of Plaintiff to the extent that he may be forced out of business entirely.

38. The imposition, liability for reporting, collection and remittance of the tribal cigarette tax in approximately 87% of the amount as Defendants' cigarette tax with respect to cigarettes delivered to, received or sold by Indian-owned retail businesses within the exterior boundaries of the Puyallup Reservation will cause the Plaintiff material and irreparable harm by depriving Plaintiff's present cigarette business of freedom of pricing. The operating revenues derived from cigarette sales are necessary for the Plaintiff to stay in business. The imposition of tax parity by Defendants also cause loss

of sovereignty and confusion to the Tribe's regulatory authority. The Tribe cannot be forced by the State to impose a cigarette tax ordinance on Tribal and Indian-owned businesses on the Reservation. The action is a tortuous attempt to interfere with the Tribe's right to agree with Plaintiff on business matters, including taxation. The proposed action is an unconstitutional taking and inverse condemnation of Plaintiff's business.

39. The federal Indian Trader Statutes, 25 U.S.C. §§ 261-64, enacted by Congress pursuant to the Indian Commerce Clause, U.S. Const., art. 1, § 8, cl. 2, 3, expressly preempt RCW ch. 43.06, as applied to cigarettes distributed to, received or sold by Indian-owned retailers within the exterior boundaries of the Puyallup Reservation. The law also interferes with Plaintiffs right to contract with out of state manufacturers and wholesalers who do not do business in Washington State or the Puyallup Indian reservation.

40. The Washington State Constitution Article 26, Second and the Treaty of Medicine Creek, 10 Stat. 1132 (1854), accepted and ratified, reaffirms the federal preemption of the State's authority to impose a cigarette tax on Indians or to allow the Defendants to contract with the Puyallup Tribe to impose the same rate of tax within Indian reservations by recognizing that "said Indian lands shall remain under the absolute jurisdiction and control of Congress of the United States" and "that no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use."

41. Senate bill 5794 effective April 5, 2005, added a new section to RCW ch. 43.06 that is different from all other compact provisions as it applies only to the Puyallup tribe and requires that the Puyallup tribal tax be only about 87% of the State of Washington tax. All other compacts with other Tribes require that the tribal tax be in the same amount as the State of Washington cigarette tax. The bill has a lock step provision providing that if the State cigarette tax is increased or decreased, the Puyallup tax will be increased or decreased by the same dollar amount. The tax is $11.75 per normal carton. Commencing July 1, 2005, the State cigarette tax will be increased $6.00 per normal carton, hence the tribal tax will be S 17.75 per normal carton and the State cigarette tax will be $20.25.

42. The new law admits that it is a price fixing law as RCW 43.06 states: "It is the legislature's intent (a) that, an increase in prices through a flat tax will reduce much of the competitive advantage". . . and "(b) that the tribal retailers can remain in business." Thirty percent of the tax will be paid over to the State. The law also states that it reduces "access to low priced cigarettes."

43. The law itself proves that the federal anti trust law is violated and that the contract is a contract of adhesion, as the State has forced and threatens to arrest and force tribal retailers out of business unless the Tribe signed the contract.

44. The statute also requires the tribal retailers purchase only from wholesalers licensed to do business in Washington. The contract provides that if wholesalers do not do business in Washington State they must certify that they will stamp the cigarettes.

Contract part VII 2a.

45. Both the law and the contract prohibit the use of any tribal tax to help tribal retailers in any way. XIV 3 b. RCW 43.06.455 (14)(a). The contract also refers to litigation. The Tribe has never defended tribal retailers against seizures and prosecutions by the State and Federal officers. Now it agrees to be a "Judas" goat to lead the tribal retailers into reduced profits and cessation of business in return for pieces of silver.

The Actions of the State of Washington in Passing Enforcement Legislation and Participation as a Party to the Contract Are Invalid.

46. RCW 37.12.060 prohibits the State from depriving any enrolled Indian from deprivation of any treaty rights. The Washington Constitution XXVI Second agrees that all enrolled Indian and tribal matters shall be in the exclusive control of the United States Congress. U.S. Const. Article VI cl 2; Article 1 Sec. 8, cl 2; Article 1§ 2. The section by the State enacting a law applying to the Puyallup Indian reservation violates the exclusive right of Congress to control Indian Commerce and make treaties. It also violates public law 280 as tax jurisdiction is reserved to the Federal Government. RCW 37.12.010.

47. The enactment allowing the State to make agreements with a dependant domestic community that retains power to its members is a violation of retained powers of the Puyallup Tribal Indians, including Plaintiff. The actions of the Department of Revenue and Washington State Liquor Control Board employees is exercised beyond their jurisdiction and controls persons beyond the scope of their authority

or limits of their employment. The actions are therefore unconstitutional and civil rights violations.

48. The actions of the State of Washington and its employees together with the Puyullup Tribe of Indians is a combination to conspire in price fixing, economic and racial discrimination, inverse condemnation, violation of the Indian and intestate commerce clauses, the right of Indians to rule themselves, the federal treaty clause, the State Constitution and other civil and constitutional rights of Plaintiff.

49. The individual and separate actions of the State and State actions violate the Dormant Commerce Clause of the federal constitution in at least the following ways, all of which injure Plaintiff.

The Contract is Preempted by Federal Preemption.

a). The conduct subsidizes non Indian competition of business that are located within the boundaries of the Puyallup Indian Reservation and which cannot be regulated by the Puyallup Tribe of Indians.

The Action is Discriminatory.

b). The conduct of the Defendants subsidizes non Indian military base concessionaires in the same market area as Plaintiff by not requiring the same or similar treatment to the military base concessionaires. This conduct violates the federal anti trust law and discriminates against Plaintiff's right to federal preemption. The lack of statutory control of contract with the military bases does nothing to limit cigarette consumption or add to the State health case funds. The attempt to regulate Plaintiff and not sales within another federally regulated area discriminates

against Plaintiff and reduces Plaintiff's competitive right to sell cigarettes. It directly affects Plaintiffs profit and profit potential. Many military concessionaires sell cigarettes without state or military base tax within Plaintiffs market area.

c). The actions of Defendants subsidizes non Indian competition outside the Puyallup reservation, but within the same market area as Plaintiff. The Tribe's constitution allows it to regulate non Indians doing business inside the reservation, but the Tribe has not taxed non Indian business. This conduct violates Plaintiffs equal protection rights.

d). The attempt by Defendants to regulate out of state wholesalers who do not do business in the State of Washington, injures Plaintiff by increasing prices that Plaintiff must pay for cigarettes at levels other than the wholesale level. It also discriminates and increases prices Plaintiff must pay to manufacturers who are not part of the Federal Master Settlement Agreement cartel. Participating manufacturers in the master settlement agreement, Universal Tobacco Settlement Act, S. 1415, 105th Congress § 155 (D) (1997) will charge Plaintiff increased wholesale prices due to the Defendants extraterritorial regulation of all manufacturer wholesalers. As a result, Plaintiff will be required to pay more for cigarettes that constitute a small part of the natural market but a significant segment of Plaintiffs sales.

The Contract Violates the Revenue Rule.

e). The agreement of the Defendants to allow employees, of the Washington State Department of Revenue and the Washington State Department of Revenue to go into Plaintiffs business premisses and to supervise regulation and/ or penalize Plaintiff is a

systematic violation of the federal Indian or interstate commerce clause and Plaintiffs Fourth and Fifth amendment rights guaranteed by the federal constitution. It also violates the common law revenue rule prohibiting one State from enforcing tax laws of another jurisdiction.

f). The action of the State of Washington in enacting a statute that applies only to the tribal retailers who are members of the Puyallup tribe violates the State Constitution art 28 prohibiting private or special laws. The legislation also violates art. 1 § 12 of the State Constitution. Prohibiting classes of citizens privileges that are not on the same terms that equally apply to all citizens of the same class. The legislation that applies only to the Puyallup Indian Reservation applies a lesser tribal tax than all other contracting Indian tribes. The enactment was later in time to the other contracts and requires the Governor to discriminate among tribal retailers of different tribes located within the exterior boundaries of the State of Washington. The special treatment deprives Plaintiff of the right to be treated in the same manner as all tribal Indians and is discriminatory, therefore void as it is a denial of the equal rights of all Indians and federal preemption of the power of Congress to treat all tribes in the same manner.

g). The conspiracy of the defendants to impose taxes, fix prices and discriminate in favor of other market participants is the proximate cause of injury to Plaintiffs business as it will reduce or eliminate his profit from cigarette sales. The State Defendants have engaged in a pattern of racketeering and highway raiding activity that violates Plaintiffs and

other Indians rights to travel in business, transport inventory, rights to be free of illegal seizures, and other illegal acts. The State Defendants have also injured Plaintiff in his cigarette business by violating anti trust laws. 15 U.S.C. 15(a). The actions of the Defendant have caused Plaintiff added expenses, increased prices for costs of goods to be sold. The injury by the State Defendants is a direct and proximate cause of Plaintiffs increased costs and reduced profit. The actions of Defendants amounts to price fixing, reduced sales to Plaintiff and higher costs. These predicate acts by the State Defendants allow Plaintiff's market competitors to gain an illegal commercial advantage and affect sales by all Indian retailers in the market area. Damages to be awarded Plaintiff from the acts, of the State Defendants will redress Plaintiffs injury. The illegal conspiracy is a claim that may be redressed by 18 U.S.C. § 1961 et seq; hence Plaintiff seeks that his proven damages be trebled.

The Contract Is a Void Adhesion Contract.

h). The actions of the State of Washington; employees of the Washington State Department of Revenue and the State of Washington Liquor Control Board currently and for many years in selective enforcement and systematic violation of the constitutional rights of Tribal Indians living in Indian reservations within the boundaries of the State of Washington, Idaho and Montana has created a superior bargaining position by the Governor of the State of Washington and his or her agency employees that renders the Puyallup tribe of Indians contract procedurally and substantively inconceivable. The contract is one sided in favor of the State as the State

gets 30% of the tribal tax but the Tribe gets none of the State tax or master settlement funds. The agreement is shocking to the conscience as it forces the Indian tribe to injure the Indians who are members of the Tribe. It is exceedingly calloused as it rewards convenience store and other state lobbyists for white owned business by increased sales and profits. The Puyallup tribe had no meaningful choice or even close to equal bargaining power. It had an implied threat of criminal action by the State to obtain advance tax for the State akin to illegal blackmail. On information and belief, the State forced the Tribe to capitulate on the issue of State taxation to preserve the Tribe's gaming compact with the State. The Tribe had to execute the contract on a take it or leave it basis and was presented by the State Defendants action from making Plaintiff and other tribal retailers from being informed or to derive any payments from the contract. The contract is void as it is an adhesion contract.

The Tribe Cannot Tax the Non Indian Purchaser.

i). The contract and statutory enactment places the incidence of tax on the retail purchaser of Plaintiff's products. The tax is simply added on to the sales price of Plaintiffs pre packaged products purchased at wholesale. The tax is imposed directly in the purchaser of Plaintiffs goods. The Puyallup tribe of Indians cannot tax non Indian purchaser's of Plaintiff's products as it has no consensual relationship with Plaintiff's purchasers. The purchases by non Indians does not significantly involve tribal services as the purchasers receive no more than any other traveler of receipt of police, fire

or medical services from the Puyallup Tribe's political integrity, economic security or health or welfare. Since the incidence of tax is on the purchaser, the Puyallup tribe has no authority to tax non tribal enrolled Indians who do not live on the Puyallup reservation. The majority of Plaintiff's customers are as described, therefore a large proportion of the tax is invalid.

Plaintiffs Claims For Relief Against The Defendant Puyallup Tribe of Indians Specifically.

50. The Tribe has violated the Treaty of Medicine Creek by allowing white, men and women and white owned business to be located within the boundaries of the Puyallup Indian Reservation. The Treaty of Medicine Creek requires approval of the Superintendent of Indian Affairs, which, on information and belief, was never obtained. The new cigarette enactment does not apply as the Tribe has failed to enforce the Treaty of Medicine Creek, failed to defend Plaintiff's invasion of rights by the State and failed to effectively govern or defend its borders. The Tribe, by enacting the tax, has interfered with Plaintiff's right to trade within the United States. This right is retained by Plaintiff and guaranteed by Article VII of the Treaty of Medicine Creek. The Tribe has ceded its right to exclude white persons to the State. The failure to regulate white business, who are competitors to Plaintiff, deprives Plaintiff of due process of law and effective Indian Government. The Puyallup Tribe of Indians owns businesses that sell cigarettes that compete with the Plaintiff. The checker board and patchwork jurisdiction of the Defendant Puyallup Tribe of Indians deprives

Plaintiff of the essential governmental services. The Puyallup Tribal Constitution confirms jurisdiction to "all people" within the reservation. This provision has never been enforced. Since Defendant Puyallup Tribe of Indians cannot provide governmental services, Plaintiff cannot be forced to stamp cigarettes and collect tax from Plaintiff's customers, or pay cigarette taxes. The tribal counsel has been conferred only the express power to negotiate with state government, but it cannot contract without congressional permission. The tribal implementing ordinance, without permission of Congress has illegally delegated its authority and has agreed that it is subject to State of Washington approval. The enactment of taxes also fails to allow tribal members to perform community labor in lieu of taxes as provided in the tribal bylaws. This conduct violates Plaintiff's Indian civil rights as provided by 25 U. S.C. 1301-1341. 2

The Doctrine of Desuetude Prevents Collection.

51. The Defendant Puyallup Tribe of Indians enacted a cigarette tax ordinance at least 30 years ago. It has never been enforced by this Defendant. Tribal cigarette retailers have openly, notoriously and pervasively failed to pay the tax and the Tribe has conspicuously not enforced the statute. The cigarette tax statues have been abrogated by non enforcement by the common law doctrine of desuetude. The cigarette tax statute have been repealed by implication and cannot be reviewed after long periods of non enforcement. Enforcement cannot be revitalized by application at this time. The attempt to enforce the law at the time is to selectively prosecute Plaintiff and blackmail, harass and cajole

him to collect and pay over an unjust and invalid exaction. The Tribe Defendant denied Plaintiff's constitutional rights of equal protection. It also imposes excessive fines and taking of property without compensation 25 U.S.C. 1302(2)(8)(5) and (7).

52. The Defendant Puyallup Tribe of Indians has not given notice to its members in advance of the contract nor have public hearings been held for comment. The contract and enabling resolutions have not been held in public for tribal member's comments. This omission violates the constitution bylaws of the Tribe and especially Article VII section 2 giving all tribal members equal opportunities to participate in the economic resources of the Tribe.

53. The Defendant Puyallup Tribe of Indians has agreed to give tax money to the State of Washington without receiving anything in return. This is a gift of tribal government funds prohibited by federal law and invalid. The tax burden the Defendant Puyallup Tribe of Indians intends to impose on Plaintiff cannot be imposed by the Tribe on non Indian business competitors of Plaintiff who sell cigarettes within the boundaries of the Puyallup reservation. Since the imposition of tax is not uniform on all cigarette retailers within the reservation the cigarette tax on Plaintiff is invalid as a denial of uniform laws and equal protection of the law.

54. The Defendant Puyallup Tribe of Indians cannot require a tribal license to do business from Plaintiff as the Tribe has not protected tribal retailers including Plaintiff in the past from enforcement by the State of Washington and federal employees and prosecutors. Since it cannot or will not provide essential governmental police protection against

invaders of Plaintiffs business, it cannot require licenses or enforce failure to obtain a business license.

SECOND CAUSE OF ACTION
INJUNCTION

55. Plaintiff realleges and incorporates all preceding paragraphs of the First Cause of Action by this reference.

56. Plaintiff brings this cause of action to obtain a preliminary and, after trial, a permanent injunction prohibiting the Defendant Governor Christine Gregoire or future governors, the Defendant State of Washington and the Puyallup Tribe of Indians from entering into any agreement with the Puyallup Tribe where two parties set the same lock step rates of cigarette tax.

57. Plaintiff also seeks an injunction prohibiting the State employees, agents, or persons acting in concert with the State Defendants from seizing his goods, entering into his business, or acting with the Tribe to enforce the tribal tax.

58. Plaintiff also seeks a permanent injunction against the Tribe prohibiting taxation imposed on Plaintiff as the Tribe has abdicated its treaty rights and powers of government.

59. The proposed action is illegal, is in restraint of trade and the parties themselves have no authority to contract for tax parity. Plaintiff has no adequate remedy at law as the proposed action will irreparable harm Plaintiff by driving away customers that will never return to Plaintiffs business. The Defendants also have sufficient resources and unlimited funds. The continued litigation alone will force Plaintiff out of business.

THIRD CAUSE OF ACTION DAMAGES

60. Plaintiff realleges and incorporates all preceding paragraphs of the First and Second Causes of Action by this reference.

61. The actions of Defendants in conducting secret negotiations and agreeing to tax Plaintiff and other tribal retailers has damaged Plaintiff and the business carried on by Plaintiff.

62. If Defendants enforce the contract without making Plaintiff a party to the contract or negotiating with Plaintiff, Plaintiff will be damaged even further.

63. Plaintiff has been and will be damaged by Defendants' monopolistic conspiracy in an amount to be determined at trial of this matter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

A. That the Court determine and declare that all sections of Wash.Rev.Code 43.06.450 through 460 are void, unlawful and unenforceable as applied to cigarettes transported, distributed, received or sold by Plaintiffs retail businesses located within the exterior boundaries of the Puyallup Reservation;

B. That the Court holds any contract signed by the Defendant State and Tribe invalid and ineffective against Plaintiff;

C. That the Court temporarily, preliminarily and permanently enjoin the prospective application of RCW ch. 43.06 preventing the Defendant State and Tribe from enforcing any provision of the statutes or contracting in any way with each other or any person or entity regarding a cigarette tax on any cigarettes to be received or sold

by Indian-owned retail businesses within the exterior boundaries of the Puyallup Reservation;

D. For orders of preliminary and permanent injunction, restraining and enjoining the Defendants, agencies of the State of Washington and Puyallup Tribe, its directors, employees and agents, and each of them, their agents, employees and all persons acting now or in the future in concert with them, from interfering in anyway with Plaintiff's right to purchase cigarettes from any distributor totally free from any certification or interference including the right to transport, buy or sell any items at retail at Plaintiffs store, located on trust land on the Puyallup Indian Reservation, including the right to purchase or sell cigarettes or other tobacco items free of reciprocal tax or state interference of any kind;

E. For an order declaring that Plaintiff and any Indian businesses selling cigarettes on the Puyallup Indian Reservation be a party to negotiations, be notified of all proceedings and be allowed to take part in meetings;

F. For a declaration that any agreement or contract entered into by the Tribe and State is invalid when attempted to be imposed or any way applied to Plaintiff;

G. For a temporary and permanent injunction enjoining the State and Tribe, the employees and agents and all persons acting in concert with Defendants now or in the future from conspiring to interfere with Plaintiff's right to sell any item of trade, including cigarettes, free of tax.

H. For an order against the Puyallup Tribe permanently enjoining the Tribe from requiring Plaintiff to be licensed by the Tribe or allowing the

Tribe to pass laws requiring Plaintiff's sales of cigarettes to be taxed by the Tribe.

I. For an order restraining State and Tribe from monopolizing or balkanizing to protect cigarette sales or affect Indian commerce in the State of Washington;

J. For damages for Defendants and those acting in concert with Defendants for violation of the laws restraining trade and commerce by conspiring to give military and other federal instrumentalities, state facilities leased under percentage leases, non-Indian convenience stores and others, an unfair and competitive advantage thereby destroying and subjecting Plaintiff's competitive right to unfair disadvantage to engage in Indian business for treble damages for RICO violations;

K. For an order of appropriate relief pursuant to 42 U.S.C. §§ 1981 and 1983 addressing the depravation committed upon Plaintiff under color of state law for ignoring constitutionally protected safeguards;

L. For reasonable costs and attorney fees; and

M. For such other and further relief in law and equity as this Court may deem proper.

DATED this 6th day of May, 2005.

s/_____
ROBERT E. KOVACEVICH, #2723
Attorney for Plaintiff
818 W. Riverside Avenue, Ste. 715
Spokane, Washington 99201
(509) 747-2104

VERIFICATION

Plaintiff, Paul M. Matheson, certifies or declares under penalty of perjury under the laws of the Puyallup Tribe of Indians that the foregoing is true and correct, except for allegations on information and belief in which he believes are true and correct.

DATED this 6th day of May, 2005.

s/
PAUL M. MATHESON

CIGARETTE TAX AGREEMENT

Between

THE PUYALLUP TRIBE OF INDIANS

And

THE DEPARTMENT OF REVENUE

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PREAMBLE

WHEREAS, the Puyallup Tribe of Indians ("Tribe") is a federally-recognized Indian tribe and sovereign Tribal government, pursuant to the Treaty of Medicine Creek with the United States of America (10 Stat. 1132), and the. Tribe's Constitution and Bylaws; and

WHEREAS, the state of Washington ("State") is a state within the United States of America, possessed of full powers of state government; and

WHEREAS, the body of federal law and policy recognizes the right and the importance of self-determination for tribes, the authority of a tribe to tax certain activities, and the need for tribal economic development; and

WHEREAS, the State has committed to the political integrity of the federally-recognized tribes within the state of Washington and has formally recognized that the sovereignty of each tribe provides paramount authority for the tribe to exist and to govern; and

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and the Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of and compliance with this Cigarette Tax Agreement; and

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Agreement will enable, taxation being an essential attribute of tribal sovereignty and a tool of self-

sufficiency; and

WHEREAS, the State and the Tribe will also benefit by the exercise of the attributes of sovereignty and from the improved well-being of enrolled members that will result from economic development by the Tribe and its members; and

WHEREAS, both the Tribe and State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis; and

WHEREAS, the mutual interests of the State and the Tribe brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, nothing herein shall waive the sovereign immunity from suit of the Tribe or the State, nor shall anything herein waive, alter, or diminish any rights, privileges, or immunities guaranteed by the Treaty of Medicine Creek; and

NOW THEREFORE, the Puyallup Tribe by and through its Chairman, and the state of Washington by and through its Governor, do hereby enter into this Agreement for their mutual benefit.

PART 1
Recitals

1. Sovereign Immunity

Nothing in this Agreement shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

2. Tribe Does Not Submit to State Jurisdiction

By entering into this Agreement, the Tribe does not concede that the laws of the State, including its tax and tax collection provisions, apply to the Tribe, its members, or agents regarding activities and conduct within or outside of Indian country.

3. State Does Not Concede Tribal Immunity

By entering into this Agreement, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

4. Agreement Does Not Create any Third Party Beneficiaries

No third party shall have any rights or obligations under this Agreement.

5. Tobacco Master Settlement Agreement

This Agreement is not intended to impact the State's share of proceeds under the Master Settlement Agreement entered into by the State on November 23, 1998. The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the Master Settlement Agreement. The Tribe agrees that it will not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters. Nothing in this Agreement supercedes or replaces chapters 70.157 or 70.158 RCW.

6. **Jurisdiction**

This Agreement does not expand or limit the jurisdiction of either the Tribe or the State.

PART II

Definitions

1. "Agreement" means this Agreement entered into by the State and the Puyallup Tribe.
2. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
3. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.
4. "Department" means the Washington State Department of Revenue.
5. "Essential government services" means services provided by the Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
6. "Indian country," consistent with the meaning given in 18 U.S.C. 1151, means:
   a. All land within the limits of the Puyallup Indian Reservation under the jurisdiction of the United States government,

notwithstanding the issuance of any patent, and, including rights of way running through the Reservation; and

b. All Indian allotments or other lands held in trust for an enrolled Tribal member or the Tribe, the Tribal titles to which have not been extinguished, including rights of way running through the same.

7. "Liquor Control Board" or "Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.

8. "Non-Indian" means an individual who is neither a Tribal member nor a nonmember Indian.

9. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Puyallup Tribe.

10. "Parties to the Agreement" or "parties" means the Puyallup Tribe and the State.

11. "Puyallup Indian Reservation" or "Reservation" means the area recognized as the Puyallup Indian Reservation by the United States Department of the Interior.

12. "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package or carton of cigarettes, which price includes the Tribal cigarette tax.

13. "State" means the state of Washington.

14. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco,

snuff; snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco products" do not fall within the definition of "cigarettes."

15. "Tribal member" means an enrolled member of the Puyallup Tribe. For purposes of this Agreement, a member of another federally recognized Tribe who is the spouse of an enrolled Puyallup Tribal member shall be treated the same as an enrolled member of the Puyallup Tribe.

16. "Tribally-licensed retailer" means a tribal member who has a business license from the Puyallup Tribe to sell cigarettes at retail from a business located in Indian country.

17. "Tribal cigarette tax" means the tax enacted as a provision of Tribal ordinance on cigarettes sold at retail, expressed as a flat amount in cents per cigarette and units of packs and cartons; as more fully set forth in Part IV of this Agreement

18. "Tribe," or "Tribal," means or refers to the Puyallup Tribe.

19. "Wholesaler" means a person who purchases, sells, or distributes cigarettes for the purpose of resale.

PART III
Applicability of the Agreement

1. **Execution of Agreement**
This Agreement shall become effective upon completion of three steps: (a) authorization for the Governor's signature by enactment of the Washington Legislature; (b) approval by the Tribal Council as indicated by the signature of the Tribal Chairman, and (c) approval by the State as indicated by the signature of the Governor. This Agreement shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Agreement.

2. **Application**
From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal resolution meeting the terms of Part IV of this Agreement, this Agreement shall apply to the retail sale of cigarettes by the Tribe as a retailer and by Tribally-licensed retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Agreement are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Tribe desires to pursue mail order and/or internet sales of cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.

3. **Scope Limited**
This Agreement is limited in scope to the selling of cigarettes by the Tribe and its members. This Agreement does not affect the tax obligations or tax treatment of:

a. Cigarettes sold at retail by non-Indians or nonmember Indians;
b. Tobacco Products as defined in Part II of this Agreement; and
c. Cigarettes manufactured by the Tribe or its enterprises within Indian country.

PART IV

Imposition of Tribal Cigarette Taxes

1. Tribally-Licensed retailers

a. The Tribe shall require, by enactment of Tribal law, that each Tribally-licensed retailer comply with the terms of this Agreement. The Tribe agrees that it will maintain and enforce a requirement that any Tribal member selling cigarettes at retail on the Puyallup Indian Reservation must first obtain a business license from the Tribe. The Tribe agrees to provide to the Department and the Board upon execution of this Agreement a list of Tribally-licensed retailers, and to provide the Department and Board with an up to date version of the list. The Tribe agrees that any cigarette retailer wholly owned by Tribe is subject to this Compact. The Tribe and the State agree that compliance efforts in regard to such retailers shall be in accordance with Part IX of this Agreement.

b. The Tribe shall enact policies regarding Tribal access to records of Tribally-licensed retailers. Such policies shall be in accord with and in furtherance of Part IX of the Agreement.

2. Tax Imposed on Retail Sales by Tribally-Licensed Retailers and the Tribe

a. Subject to Part VI, Section 1, concerning retail sales to Tribal members, the Tribe, by ordinance and in accord with the requirements of this Part, shall impose Tribal cigarette taxes on all sales by the Tribe as retailer and by Tribally-licensed retailers of cigarettes to retail purchasers within Indian country.

b. Beginning no sooner than the date this Agreement is signed by both parties, and subject to enactment of a Tribal ordinance authorizing the imposition of a Tribal cigarette tax, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than 5.875 cents per cigarette (eleven dollars and seventy-five cents per standard carton).

c. During the term of this Agreement, upon any future increase in the State cigarette tax, the Tribal cigarette tax shall increase by no less than the dollar amount of the increase in the State tax. Upon any future decrease in the State cigarette tax, the Tribe may decrease its cigarette tax in a similar manner.

d. During the term of this Agreement the State agrees that State taxes are not applicable to transactions that comply with the requirements of this Agreement. The State waives its right to collect the State cigarette, sales, and use taxes as to those transactions from the Tribe, Tribally-licensed retailers, state licensed wholesalers from which they purchase, or retail buyers. In addition, the

State agrees that enforcement of this Agreement shall be done in accordance with the conditions set forth in this Agreement.

3. **Revenue-Sharing**
The Tribe shall provide to the State, on a quarterly basis, thirty percent (30%) of the revenue that the Tribe receives from the collection of the Tribal cigarette tax imposed under this part.

PART V
Purchase and Sale of Cigarettes by Tribal Retailers

1. **Wholesale Purchases – Requirements**
By Tribal ordinance, the Tribe shall maintain and enforce a requirement that the Tribe as a retailer and Tribally-licensed retailers acquire cigarettes only from wholesalers or manufacturers licensed by the State to sell cigarettes at wholesale in the State; or the Tribe, subject to the requirements of Part VII, section 2 of this Agreement.

2. **Delivery of Cigarettes to Tribal Retailers Outside of Indian Country**
Cigarettes bearing the tax stamp required by this Agreement may be delivered or transferred within or outside of Indian country by a wholesaler to the Tribe or a Tribally-licensed retailer. Deliveries may be made by commercial carriers. Invoices identifying the cigarettes as Puyallup Tribe cigarettes must accompany such cigarettes.

3. **Retail Sale – Pricing Requirements**
The retail selling price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of cigarette tax imposed on the cigarettes.

PART VI
Tax Stamps

1. Tax Stamp Required

a. Tribal retailers may not possess unstamped cigarettes. All cigarettes sold by Tribally-licensed retailers and the Tribe shall bear a Tribal tax stamp meeting the requirements of part VI

b. The Tribe agrees to require Tribally-licensed retailers to post a notice advising that cigarettes may not be purchased for resale.

c. The Tribe agrees it will impose a tax on sales to members.

2. Creation and Supply of Tribal Tax Stamp

a. The Tribe shall arrange for the creation and supply of a Tribal tax stamp by an appropriate manufacturer. Tribal tax stamps will have a serial number or some other discrete identification so that stamps may be traced to the wholesaler.

b. The Tribe shall purchase stamps from a nationally recognized stamp manufacturer.

3. Stamp Vendor Contract

a. The Tribe shall contract with a bank or other appropriate vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment by the wholesaler to the vendor of the Tribal cigarette tax and remit the collected taxes to the Tribe. The contract shall provide that the Tribe shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase by wholesalers through the stamp vendor. The Tribe may, at its option,

select as the stamp vendor the bank with which the Department contracts for that service, or some other third party stamp vendor satisfactory to both the Tribe and the Department. The Tribe agrees to provide the Department of Revenue with a copy of its stamp vendor contract.

b. The Tribe shall require the stamp vendor to:
   i) Remit to the Tribe all revenue collected from the Tribal cigarette tax (such amount being less a reasonable administrative fee for stamping wholesalers);
   ii) Provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department;

c. This agreement contemplates that the Tribe may at some point in the future act as its own stamp vendor. In the event that the Tribe decides to act as its own stamp vendor, it agrees to first enter into a memorandum of agreement with the Department regarding this activity.

4. Requirements for Affixation of Stamps by Wholesalers

a. Wholesalers shall affix the tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribally-licensed retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp.

b. Wholesalers may only possess unstamped

cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Agreement. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.

c. For the purposes of this Section 4 of Part VI, any business outlet selling cigarettes at retail, including an outlet wholly owned and operated by the Tribe, is not a wholesaler. The Tribe agrees to purchase for and sell from any retail outlet that it owns and operates only stamped cigarettes acquired from the sources listed in Part V of this Agreement.

5. Wholesaler Obligation Under State Law

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Agreement (in the case of Tribe acting as a wholesaler and subject to Part VII (2) of this Agreement), and compliance with other requirements in this Agreement, shall be deemed to satisfy the State cigarette excise tax obligation of a wholesaler.

6. State Agreement Regarding Compliance with State and Federal Law

The State agrees that all transactions that conform with the requirements of this Agreement do not violate state law and that it will not assert

that any such transaction violates state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws or other tax laws.

PART VII
Wholesalers

1. **Wholesalers Licensed by the State**
   Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to State tax and which cigarettes are subject to the Tribal cigarette tax.

2. **Tribe *as* Own Wholesaler**
   The Tribe may sell stamped cigarettes to Tribally-licensed retailers for sale at retail under the terms of this Agreement. If the Tribe, by itself or through a wholly-owned and operated Tribal enterprise, sells cigarettes at wholesale to Tribally-licensed retailers, that wholesale activity does not require a memorandum of agreement under this Section. However, the Tribe agrees that it will be subject to the same buying restrictions *as* wholesalers licensed with the state of Washington, including the provisions of chapters 70.157 and 70.158 RCW, and RCW 19.91. 300. In addition, the Tribe agrees that it will notify the State in advance of initiating business as a wholesaler and will work in conjunction with the Department of Revenue and the Liquor Control Board to assure that all necessary steps and controls are in place to assure security of the stamping process, handling of tax receipts, and integrity of the overall function.

PART VIII
Enforcement Authority Program

1. **Intent**
   It is the intent of the parties that responsibility for enforcement of the terms of this Agreement shall be shared by the State and the Tribe. The State shall have primary responsibility, exercised by its Liquor Control Board, for enforcement against non-Tribal and non-Tribal member wholesalers, to the extent allowed under law. The Tribe shall have primary responsibility for enforcement against Tribal member retailers. The parties shall work cooperatively by providing each other with relevant information and in other necessary ways to facilitate their respective enforcement responsibilities.

2. **Commercial Carriers**
   The State recognizes that wholesalers who meet the requirements of this Agreement may make shipments of cigarettes by commercial carrier. Such shipments must be accompanied by documents required under this Agreement and are subject to advance notice requirements.

3. **Notification**
   If the Tribe has elected to act as a wholesaler, the Tribe or its designee shall notify the Department seventy-two (72) hours in advance of any shipments of unstamped cigarettes to the Tribe. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the cigarettes to seizure. The

State and the Tribe may enter into a memorandum of agreement addressing the Tribe's activity as a wholesaler, in which case, this advance notice provision is not applicable and is supplanted by the terms of the memorandum of agreement.

PART IX
Compliance and Enforcement Program

1. General

The parties wish to provide assurance and ongoing confirmation that they are in compliance with the terms of this Agreement. This Part will provide a process for regular verification of that compliance. The verification process is intended to reconcile data from all sources that make up the cigarette stamping, selling, and taxing activities under this Agreement. Both parties acknowledge that the requirement to purchase cigarettes from wholesalers licensed with the State provides the State access to wholesaler records and provides both parties certainty in regards to stamping of cigarettes and collection of taxes.

2. Compliance Program

a. The Tribe agrees to establish, in consultation with the Liquor Control Board and the Department of Revenue, a retailer compliance program. The purpose of the program is to monitor compliance with this Agreement and the ordinances enacted to implement this Agreement. The program shall include measures to monitor and investigate retailers in regard to:

i) Sales to minors;

ii) Sales of unstamped cigarettes;
iii) Sales of cigarettes obtained from unauthorized sources;
iv) Pricing compliance; and
v) Other factors agreed to by the parties.

b. The Tribe agrees it will provide monitoring, sampling, investigation, reporting, and related activities necessary to carry out the retailer compliance program, either by contract with an independent third party or by the Tribe's Cigarette Tax Enforcement Department ("CTED.") These functions will be conducted either by CTED or by a third party under contract with the Tribe. The choice between those two options and the identify of the third party, if any, is subject to the approval of the State.

c. The Tribes agrees that it will require in its contract with the third party that all reports be shared simultaneously with the Tribe, the Department of Revenue, and the Board. The Tribe, Board, and Department of Revenue working together shall establish the frequency for reports and criteria for timeliness of reporting and sharing information regarding violations. Except in cases of suspected and/or documented violations of the Agreement or Tribal law, the reports will not reveal the identities of retailers who are the subjects of the reports, other than to verify that all Tribally-licensed retailers have been monitored within the period of time specified by the parties as appropriate.

3. Tribal Auditor to Review Government Records

a. For the purposes of any audit involving its government accounts and enterprise activities, the Tribe may use the same independent auditor that it uses to perform its routine government audits. The Tribe agrees that the auditor will be a certified public accountant in good standing. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified. The Tribe will retain the Auditor and bear the costs of the auditing services. The Tribe shall be entitled to communicate freely with the Auditor.

b. The Auditor shall review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Agreement only as necessary for an internal reconciliation of the Tribe's books. The purpose of the audit is to reconcile tax collections and to provide the State timely and accurate information regarding compliance with this Agreement.

c. The Auditor will compile and provide to the Department of Revenue, the Liquor Control Board, and the Tribe, a separate report containing timely and accurate information on the following topics:
   i. Overall tax collection;
   ii. Revenue sharing;
   iii. Stamp inventory and stamp purchases (in order to reconcile tax collections);
   iv. A determination of whether the Tribe has expended revenue from the cigarette tax on

essential government services.

d. The Auditor shall provide a report on these topics to the Tribe, the Department, and the Liquor Control Board, once a year, covering the just-concluded fiscal year, and shall be delivered no later than 90 days after the end of the Tribe's fiscal year. The first required review shall cover the period from the effective date of the tax through the end of the Tribe's fiscal year. The Department and the Board shall be entitled, by operation of this Agreement, to the Auditor's report as outlined in this subsection, but not to a copy of the Auditor's complete audit of the Tribe's books -and records.

PART X
Dispute Resolution

1. General

a. The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. It is the parties' expectation that most disagreements and violations should and will be resolved most effectively through informal discussion. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.

b. As used in this Part "days" means business days, unless otherwise specified.

2. Summary

The parties intend, as spelled out in greater detail below, that the dispute resolution process will include the following elements:

a. Notification of Violation;
b. Meeting(s) and informal discussion seek resolution of dispute;
c. Mediation: opinion and recommendation of mediator,
d. Correction of violation;
e. Termination of Agreement under defined circumstances.

3. Notification of Violation

a. If a party believes that there has occurred or is occurring a violation covered by this Part X, it shall notify the other party in writing, stating the nature of the alleged violation and any proposed corrective action or remedy ("Notice of Violation"). Violations that are subject to this Part include violations of (a) this Agreement or (b) applicable law that either party has undertaken in this Agreement to enforce, committed by (x) either party, (y) a Tribally-licensed retailer, or (z) a state-licensed wholesaler. An error made by the Auditor in any of its reports is also an appropriate subject for the dispute resolution procedure in this Part X.

b. The parties shall meet within 14 days after receipt of a Notice of Violation, unless the parties agree on a different date, and on such further occasions as they shall agree to meet. They shall attempt to resolve the issue(s) raised by the Notice of Violation and to provide an opportunity to implement any agreed corrective action.

4. Mediation

a. If the parties are unable to resolve the

disputed issues through joint discussions under Section 3 of this Part, either party may request mediation by giving the other party a written mediation demand ("Mediation Demand"). The parties shall attempt to agree on a mediator. If they cannot agree on a mediator within 30 days of the Mediation Demand, each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator. Mediation shall occur within a reasonable time of selection of the mediator(s). The parties shall bear their own attorneys fees but shall share equally the other costs of conducting the mediation, including the fees of the mediator.

b. The parties recognize that disagreements and violations of the terms of this Agreement caused by actions of any retailer or wholesaler may take longer to resolve. With respect to that part of a disagreement or dispute involving a member retailer, the parties must wait at least 45 days after the sending of the Notice of Violation before delivering a Mediation Demand. The parties recognize that in cases where the appropriate remedy for a violation is enforcement action against the retailer or wholesaler, that action, even though initiated within 45 days, may take longer than that period of time to complete. It is the expectation of the parties that the parties will work together diligently during this period to arrive at a solution.

5. Opinion, Recommendation, Remedies

Within a reasonable time after completion of the mediation session(s), the mediator(s) shall render an opinion as to whether a violation has occurred, including any recommended corrective action to remedy the violation. The mediator(s) shall not render an opinion or make a recommendation as to any issue on which the parties have reached agreement. Recommended remedies may include audit of relevant Tribal, a retailer's, or a wholesaler's records, interpretation of Agreement terms, changes in reporting, recordkeeping, enforcement practices, business practices, action by one or both parties to enforce the requirements of this Agreement or of applicable law, or similar actions. Recommended remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Agreement.

6. **Termination of Agreement**

a. It is the parties' intent that in cases where, in the mediator(s) opinion, there has been a substantial violation of this. Agreement, the offending party be given a reasonable time to initiate and complete corrective action. A "reasonable time" will vary with the circumstances, but shall in general be the time that would ordinarily be required for a government, taking immediate action pursued with due diligence, to correct the violation or obtain compliance. A "substantial violation" is any violation that deprives either party of an important element of what it bargained for in this Agreement and includes, but is not

necessarily limited to, the following violations:

i) Ongoing, significant retail sales of unstamped cigarettes during the term of this Agreement;

ii) Failure to submit to mediation as required by this Part;

iii) Failure of the Tribe to establish a compliance program;

iv) A breach of the confidentiality provisions of Part XIII of this Agreement;

v) Failure of the Tribe to meet the revenue sharing obligations under this Agreement

vi) The State's violation of Part IV, Section 2(d) or Part VI, Section 6 of this Agreement;

vii) The Tribe's refusal to allow or require the Auditor access to records it needs to conduct it its audit; and

viii) Failure of the Tribe to enforce the terms of this Compact in regards to member retailers.

b. If the party in violation has not corrected the problem or obtained or sought compliance within a reasonable time, after receipt of the mediator(s) opinion finding a substantial violation of the Agreement, the aggrieved party may, in its discretion choose to terminate this Agreement. If the aggrieved party chooses not to terminate the Agreement at that time, it does not waive its right to terminate the Agreement subsequently at any time if the violation remains uncorrected.

7. Notification of Sales to Minors Violation

The Department and/or the Liquor Control Board shall immediately notify the Tribe if an allegation

is made that a Tribally-licensed retailer has made sales to minors in violation of Part XIV, Section 2 of this Agreement. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal law. Upon the third or subsequent violation within any calendar year, the provisions of Sections 2 through 5 of this Part shall apply.

8. **Notice Requirements**

For the purposes of this Agreement, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be given three (3) working days after the date written notice is sent. Notice shall be given as follows:

To the Department: Director
Washington. State
Department of Revenue
P.O. Box 47454
Olympia, WA 98504-7454

To the Tribe: Chairman, Puyallup Tribal Council
1850 Alexander Avenue
Tacoma, WA 98421

With a copy to: Legal Department
Puyallup Indian Tribe
1850 Alexander Avenue
Tacoma, WA 98421

PART XI

Responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board

The Parties recognize that this Agreement describes a mutual undertaking with shared responsibilities and further recognize the

responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board to be *as* follows:

1. **Tribe**
   The Tribe is responsible for the administration of the Agreement, a compliance program, audit and recordkeeping, and dispute resolution, as well as negotiation of its terms.

2. **Liquor Control Board**
   This Agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW. The Board is responsible to provide input and expertise to the Department during negotiations and to work together with the Department of Revenue and the Tribe to ensure compliance with this Agreement.

3. **Department of Revenue**
   The Department is responsible for the administration of the. Agreement, audit procedures and recordkeeping, and dispute resolution, as well as negotiation of its terms, on behalf of the State.

PART XII
Term of this Agreement — Amendment

This Agreement may remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions of Part X of this Agreement. Amendments or extensions to the Agreement shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Agreement shall be subject to the dispute resolution process in Part X of this Agreement.

PART XIII
Confidentiality

All information under the terms of this Agreement received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

PART XIV
Miscellaneous Provisions

1. Periodic Review of Agreement Status

a. Representatives of the Tribe and the Department shall meet at mutually agreeable times and places upon the reasonable request of either party to review the status of this Agreement and any issues that have arisen under the Agreement.

b. It is the expectation of the parties that the Tribe, the Department, and the Liquor Control Board will meet freely to discuss jurisdictional issues, expectations, and protocols, and to share enforcement and compliance information.

2. Sales to Minors

Neither the Tribe nor a Tribally-licensed retailer shall sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.

3. Essential Government Services

Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall

certify the use of such revenue under the process set forth in Part IX of this Agreement.

4. **Rule 192 — Application**
This Agreement is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

5. **Other Retail Sales within Indian Country by Tribal Members**
Under Puyallup Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Compact.

6. **Subsequent State Legislative Enactments**
If the State Legislature enacts a law that provides more favorable terms for the Puyallup Tribe, the parties shall amend the Agreement to reflect such terms.

7. **Severability**
If any provision of this Agreement or its application to any person or circumstance is held invalid, the remainder of the Agreement is not affected.

THUS AGREED THIS 20th day of April, 2005

PUYALLUP TRIBE **STATE OF WASHINGTON**

By: s/_____
Herman Dillon, Sr.,
Chairman
The Puyallup Tribe

By: s/_____
Christine 0. Gregoire,
Governor
State of Washington

TREATY WITH THE NISQUALLI, PUYALLUP, ETC., 1854.

Dec. 26, 1854. | 10 Stat., 1132. | Ratified Mar. 3, 1855. | Proclaimed Apr. 10, 1855.

Articles of agreement and convention made and concluded on the She-nah-nan , or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S"Homamish, Stehchass, T" Peek-sin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget"s Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1.

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly

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direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite

the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes"s Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon"s Island, easterly and southeasterly, to the place of beginning.

ARTICLE 2.

There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley"s and Totten"s Inlets, and separated from Hartstene Island by Peale"s Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget"s Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon

any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3.

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

ARTICLE 4.

In consideration of the above session, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who

may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5.

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree

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to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6.

The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the

sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8.

The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10.

The United States further agree to establish at the general agency for the district of Puget"s Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter"s shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employéées, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

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ARTICLE 11.

The said tribes and bands agree to free all slaves now

held by them, and not to purchase or acquire others hereafter.

ARTICLE 12.

The said tribes and bands finally agree not to trade at Vancouver"s Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

Isaac I. Stevens, [L. S.]
Governor and Superintendent Territory of Washington.
Qui-ee-metl, his x mark. [L. S.]
Sno-ho-dumset, his x mark. [L. S.]
Lesh-high, his x mark. [L. S.]
Slip-o-elm, his x mark. [L. S.]
Kwi-ats, his x mark. [L. S.]
Stee-high, his x mark. [L. S.]
Di-a-keh, his x mark. [L. S.]
Hi-ten, his x mark. [L. S.]
Squa-ta-hun, his x mark. [L. S.]
Kahk-tse-min, his x mark. [L. S.]
Sonan-o-yutl, his x mark. [L. S.]

Kl-tehp, his x mark. [L. S.]
Sahl-ko-min, his x mark. [L. S.]
T"bet-ste-heh-bit, his x mark. [L. S.]
Tcha-hoos-tan, his x mark. [L. S.]
Ke-cha-hat, his x mark. [L. S.]
Spee-peh, his x mark. [L. S.]
Swe-yah-tum, his x mark. [L. S.]
Cha-achsh, his x mark. [L. S.]
Pich-kehd, his x mark. [L. S.]
S"Klah-o-sum, his x mark. [L. S.]
Sah-le-tatl, his x mark. [L. S.]
See-lup, his x mark. [L. S.]
E-la-kah-ka, his x mark. [L. S.]
Slug-yeh, his x mark. [L. S.]
Hi-nuk, his x mark. [L. S.]
Ma-mo-nish, his x mark. [L. S.]
Cheels, his x mark. [L. S.]
Knutcanu, his x mark. [L. S.]
Bats-ta-kobe, his x mark. [L. S.]
Win-ne-ya, his x mark. [L. S.]
Klo-out, his x mark. [L. S.]
Se-uch-ka-nam, his x mark. [L. S.]
Ske-mah-han, his x mark. [L. S.]
Wuts-un-a-pum, his x mark. [L. S.]
Quuts-a-tadm, his x mark. [L. S.]
Quut-a-hch-mtsn, his x mark. [L. S.]
Yah-leh-chn, his x mark. [L. S.] To-lahl-kut, his x mark. [L. S.] Yul-lout, his x mark. [L. S.]
See-ahts-oot-soot, his x mark. [L. S.]
Ye-takho, his x mark. [L. S.]
We-po-it-ee, his x mark. [L. S.]
Kah-sld, his x mark. [L. S.]
La"h-hom-kan, his x mark. [L. S.]
Pah-how-at-ish, his x mark. [L. S.]

Swe-yehm, his x mark. [L. S.]
Sah-hwill, his x mark. [L. S.]
Se-kwaht, his x mark. [L. S.]
Kah-hum-klt, his x mark. [L. S.]
Yah-kwo-bah, his x mark. [L. S.]
Wut-sah-le-wun, his x mark. [L. S.]
Sah-ba-hat, his x mark. [L. S.]
Tel-e-kish, his x mark. [L. S.]
Swe-keh-nam, his x mark. [L. S.]
Sit-oo-ah, his x mark. [L. S.]
Ko-quel-a-cut, his x mark. [L. S.]
Jack, his x mark. [L. S.]
Keh-kise-bel-lo, his x mark. [L. S.]
Go-yeh-hn, his x mark. [L. S.]
Sah-putsh, his x mark. [L. S.]
William, his x mark. [L. S.]

Executed in the presence of us—

M. T. Simmons, Indian agent.
James Doty, secretary of the commission.
C. H. Mason, secretary Washington Territory. W. A. Slaughter, first lieutenant, Fourth Infantry.
James McAlister,
E. Giddings, jr.
George Shazer,
Henry D. Cock,
S. S. Ford, jr.,
John W. McAlister,
Clovington Cushman,
Peter Anderson,
Samuel Klady,
W. H. Pullen,
P. O. Hough,
E. R. Tyerall,

George Gibbs,
Benj. F. Shaw, interpreter,
Hazard Stevens.

Article I §5

Constitution of the United States of America

§8 POWERS OF CONGRESS. The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

49 U.S.C.A. § 14501

§ 14501. Federal authority over intrastate transportation (c) Motor carriers of property.

(1) General rule. --Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not act or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713 (b)(4) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C.A. § 13102

§ 13102. Definitions

(16) Motor vehicle. – The term "motor vehicle"

means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

43.06.455 Cigarette tax contracts–Requirements–Use of revenue–Enforcement–Definitions.

(3) A cigarette tax contract with a tribe shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers. The tribe may allow an exemption for sales to tribal members.

(5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:

(a) Wholesalers or manufacturers licensed to do business in the state of Washington;

(b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the state of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative

and enforcement powers over such wholesalers or manufacturers to the extent permitted by law;

(c) A tribal wholesaler that purchases only from a wholesaler or manufacturer described in (a), (b), or (d) of this subsection; and

(d) A tribal manufacturer.

82.24.250 Transportation of unstamped cigarettes–Invoices and delivery tickets required–Stop and inspect.

(1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.

(7) For purposes of this section, the term "person authorized by this chapter to possess unstamped cigarettes" means:

(a) A wholesaler, licensed under Washington state law;

(b) The United States or an agency thereof; and

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be

reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

(2)

No. 08-23

FILED

JUL 25 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PAUL M. MATHESON,

Petitioner,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Control Board; THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; CHAD R. WRIGHT, Cigarette Tax Director, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Washington Division II

BRIEF FOR THE TRIBAL RESPONDENTS IN OPPOSITION

HARRY R. SACHSE
WILLIAM F. STEPHENS
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IN THE

Supreme Court of the United States

No. 08-23

PAUL M. MATHESON,

Petitioner,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Control Board; THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; CHAD R. WRIGHT, Cigarette Tax Director, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Washington Division II

BRIEF FOR THE TRIBAL RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The State of Washington and the Puyallup Indian Tribe in 2005 resolved a longstanding dispute by

entering into an agreement for the collection of cigarette excise taxes. Pet. App. A-51 - A-79. They followed the guidance offered by this Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 515 (1991), and other cases that, "States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."

Petitioner sells cigarettes at retail under a license from the Tribe. He filed this case to challenge the agreement. Pet. at 2. The trial court dismissed the Tribal defendants based on the Tribe's sovereign immunity from suit, then dismissed the State defendants and the case under Rule 19 of the Federal Rules of Civil Procedure because of the absence of the Tribe, a necessary and indispensable party. Pet. App. A-2.

The Washington Court of Appeals examined the grounds for dismissal in careful detail and affirmed. *Matheson v. Gregoire*, 161 P.3d 486 (Wash. Ct. App. 2007). The Washington Supreme Court denied review. 180 P.3d 1292 (Wash. 2008). None of the courts reached the merits of any of Petitioner's issues or claims.

REASONS FOR DENYING THE WRIT

I. The Questions Presented by Petitioner Were Not Decided by the Courts Below and Therefore Do Not Merit Review by This Court.

The Questions Presented in the Petition concern issues underlying the allegations made in the complaint. Pet. at i. The courts below, however,

dismissed the case without reaching those two issues or indeed the merits of any claims.

This Court consistently indicates that, "Where issues [were not] considered by the Court of Appeals, this Court will not ordinarily consider them." *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), paraphrase included); *accord Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998).

The Petition therefore does not merit review by this Court.

II. The Questions Decided Below Do Not Merit Review.

The holdings below do not merit review by this Court. They are consistent with the long-established sovereign immunity of Indian tribes from suit absent any waiver or abrogation of that immunity. *See, e.g., United States v. U.S. Fidelity & Casualty Co.*, 309 U.S. 506, 511-513 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Wash. Dep't of Game*, 433 U.S. 165, 172-173 (1977); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

Both Federal and Washington state courts hold that challenges to an agreement between two sovereigns are inappropriate under Rule 19 in the absence of one of those sovereign parties. *See, e.g., Aungst v. Roberts Constr. Co., Inc.*, 625 P.2d 167, 169 (Wash. 1981). "[A] party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002).

Those threshold jurisdictional and procedural issues upon which the courts below disposed of the case therefore do not merit review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 25, 2008